IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 197 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRABHATBHAI S DESAI

Versus

AHMEDABAD ELECTRICITY CO.LTD.

Appearance:

1. Appeal from Order No. 197 of 2004

MR BK DAMANI for Appellant No.

MR KB PUJARA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 30/06/2004

ORAL JUDGEMENT

This Appeal From Order is filed being aggrieved of an order passed below Notice of Motion in Civil Suit No.1521 of 2004 dated 15.06.2004, whereby the learned Judge of the City Civil Court, Ahmedabad was pleased to dismiss the Notice of Motion.

2. The learned advocate appearing for the appellant submitted that The Electricity Act, 2003 (hereinafter referred to as "the new Act" for the sake of brevity) is applicable to the facts of the case that under the provisions of section 126 of the new Act, in the event of noticing an irregularity on inspection, the Ahmedabad Electricity Company (hereinafter referred to as "the respondent company") could have assessed the charges for a period of three months only and not for a period of six months; that the assessment could have been only 1.5 times, and not 2.5 times; that the appellant is served with an assessment order for a sum of Rs.54,287/-, and in addition to that the appellant is also directed to deposit a sum of Rs.5400/-, by way of security deposit; that there is no provision under which the appellant could have asked to deposit such security deposit under the new Act; that thus the amount assessed is incorrect on two counts, (i) it is assessed for a period of six months, and (ii) it is at the rate of 2.5 times rather than 1.5 time.

3. On contentions being raised, order for issuance of 'notice' was passed on 18.06.2004, but on condition that, 'the appellant shall deposit a sum of Rs.20,000/-'. The appellant deposited that amount and complied with the condition precedent thereafter the notice was issued by the Registry of this Court.

4. Mr.Pujara, the learned advocate appears in response to the notice of this Court, an affidavit in reply affirmed by one Shri Sudhirbhai J. Shah, Manager (Legal) of the respondent company is filed. The learned advocate submitted that, not only this Appeal From Order but even the suit filed by the appellant-plaintiff is required to be dismissed, for the simple reason that, the incident which is the subject matter of this entire litigation, is detection of unauthorised addition and/ or alteration of the consumer's electrical installation without permission of the licensee-the Ahmedabad Electricity Company Limited. He further submitted that it is reflected in the inspection slip and it was served to the appellant-consumer/ his representative on 02.04.2004. The appellant was found, "indulging in interfering with the meter or licensee's works, etc.,

including preventing the meter from registering the actual consumption of energy". The learned advocate pointed out the cause, mentioned in the said inspection slip, which reads as under:

> "By opening 'N' in LCDP a switch is installed and by virtue of that electric supply is on earthing basis-- earthing switch is installed-- and supply is disconnected."

5. Mr.Pujara, the learned advocate submitted that, in the new Act transitional provisions are made in section 172. According to him clause (d) of section 172 of the new Act has direct application to the facts of the present case which reads as under:

> "(d) the State Government may, by notification, declare that any or all the provisions contained in this Act, shall not apply in that State for such period, not exceeding six months from the appointed date, as may be stipulated in the notification." (emphasis supplied)

He submitted that '10.06.2003' was the 'appointed date' notified to be the date, for coming into force of the new Act. The State of Gujarat opted to exercise discretion under the aforesaid clause (d) of section 172. Hence the new Act has come into force, in the State of Gujarat, on '10.12.2003'. The learned advocate submitted that, on coming into force of the new Act also, all the provisions have not become operative, because some of the provisions are provided with, 'a time frame' by which they are to become operative. The learned advocate pointed out section 185 of the new Act, which is for 'repeal and saving'. The learned advocate invited attention of the Court to clause (a) of subclause (2) of section 185 of the new Act, which reads as under:

> "(2) Notwithstanding such repeal, -
>
> (a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, insofar as it is not inconsistent with the

provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act; (emphasis supplied)

6. The learned advocate then referred to the provisions of section 14 of the new Act, which deals with 'grant of licence'. The learned advocate invited attention to the proviso to section 14 of the new Act, which reads as under:

"Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business (emphasis supplied)

From the aforesaid the position emerges that, the provisions of repealed law were to continue to apply, for a period of one year, from the date of commencement of this Act, unless any other period is specified, at the request of the licensee-the respondent company, by the appropriate commission. In the present case, there is nothing on the record to show that any 'other period' is specified by the appropriate commission and therefore, the provisions of the repealed laws continue to be applicable to the State of Gujarat upto 10.12.2004. Alternatively, even if the period of one year, provided under the proviso to section 14, is to be reckoned from 10.06.2003, then also it will be upto 10.06.2004. Therefore, the incident-the subject matter of this litigation, which is of 02.04.2004, will in any case be governed by the provisions of the repealed Act and not the new Act.

7. Mr.Pujara, the learned advocate submitted that the appellant-plaintiff has successfully misled the trial court and also this Honourable Court in getting the suit entertained and notice issued in this Appeal From Order. The learned advocate submitted that under the repealed

law the respondent-company had formulated "Conditions of Supply & Miscellaneous Charges" (hereinafter referred to as "the Conditions") which were approved by the Government of Gujarat by notification No.GU9419AEC16914208- K dated 14th October 1994 issued by Energy and Petrochemicals Department. The learned advocate made a copy of the Conditions for perusal of this Court which is taken on record. The learned advocate invited attention of this Court to 'clause 22 of Part I' of the Conditions which is titled as "Malpractice". He submitted that subclause (c) empowers a licensee to disconnect the supply of electricity. Subclause (c) reads as under:

> "Without prejudice to the rights of the licensee to initiate legal proceedings against any person found to be committing any of the malpractices mentioned above, the licensee shall be entitled to disconnect the supply of such a consumer. The supply shall not however be reconnected unless the consumer has qualified for reconnection by removing the cause of disconnection and settled the charges as per item (b)."

8. The learned advocate also submitted that 'clause 23 of Part I' deals with 'theft of energy' and that also empowers the licensee to, 'disconnect power supply'. In this regard he relied upon clause 23(b) of Part I of the Conditions which reads as under:

> "(b) Without prejudice to the licensee's rights to initiate legal proceedings against any consumer or person found to be committing any of the offences mentioned under sub-item (a) above, the licensee shall be entitled to disconnect the supply of a consumer or person and to recover from him such charges as are assessed by the licensee as provided for under item no.11 of Part II of these Conditions of Supply and Miscellaneous Charges. The supply to the service will be kept disconnected for a period of 30 days from the date of disconnection on the ground of offences mentioned under sub-item (a) subject to review by Competent Authority or until the amount so assessed against theft of energy is paid by the consumer, whichever is later."

9. The learned advocate submitted that thus, there is no doubt that the aforesaid Conditions of Supply and Miscellaneous Charges, which are duly approved by Energy and Petrochemicals Department, Government of Gujarat by

Notification dated 14.10.1994 empowers the liecensee 'to disconnect power supply' of any person who is found to be either indulging in 'malpractice' or 'theft of energy'.

10. The learned advocate submitted that such conditions are 'statutory' in nature as held by the Honourable the Apex Court in the matter of M.P. Electricity Board, Jabalpur and others Vs. Harsh Wood Products and another, reported in A.I.R. 1996 SC 2258 wherein the similar conditions were before the Honourable the Apex Court for consideration. The learned advocate referred to para 6 of the judgement wherein 'the condition' is reproduced, the same is quoted here for ready reference and comparison.

"(e) Where any consumer is detected in the commission of any malpractice with reference to his use of electrical energy including authorised alternations to installations, unauthorised extension and use of devices to commit theft of electrical energy the Board may, without prejudice to its other rights, cause the consumer's supply to be forthwith disconnected. The supply may be restored in the discretion of the Division Engineer of the Board if the consumer forthwith compensates the Board and pays all dues as per bill and takes such other actions as he may be directed by the Divisional Engineer of the Board to take in this connection." (emphasis supplied)

11. The learned advocate submitted that the contention raised by the appellant stands answered by observations made in paras 8 and 9 of the decision of the Honourable the Apex Court, which read as under:

"the disconnection of the electricity supply is unjust, arbitrary, and hence the same is without giving any notice to the appellant-- consumer."

"8. The learned counsel for the respondent placed strong reliance on section 24 of the Indian Electricity Act, 1910 which contemplates seven days' notice before disconnection. Section 24 does not apply to demand on detection of pilferage. It would apply to a case of regular supply made and prior demand for payment of electricity charges with a notice of seven days to be made and for failure to pay within the given time, after expiry of seven days, the

appellant as a licensee would get the right to disconnect the supply of electrical energy. It would thus be seen that disconnection will be in the course of regular supply of electricity for non payment of the usual bills but not to any case demand after detection of pilferage." (emphasis supplied)

9. The only question is: whether the consumer is entitled to hearing before disconnection? In view of the conditions to which the respondents had agreed at the time of installation and also the prima facie conclusion reached by the authorities, it was not necessary to give further hearing to the respondents. The action taken by the appellant is not violative of Articles 20(1), 14 of the Constitution and principles of natural justice."

12. The learned advocate then referred to 'clause 15 of Part I' of the Conditions which empowers the respondent-company to demand 'security deposit', in the present case Rs.5400/-, as security deposit is demanded. The learned advocate submitted that, various contingencies are mentioned in clause 15, in which the respondent can ask for security deposit. One of them is, 'towards the minimum two years' guaranteed revenue under Clause V and/ or VI of the Schedule to the Act'. He submitted that as in the present case it was found that the consumer was prima facie indulging in malpractice/ theft of energy, it was thought fit by the respondent to ask for security deposit, and that cannot be said to be arbitrary by any stretch of imagination.

13. The learned advocate then referred to 'clause 13 of Part II' of the Conditions which provide for 'appeal against assessment'. The learned advocate very emphatically submitted that the appellant-plaintiff has misled the learned Judge of the trial court and also this Court by not pointing out this provision. Without resorting to, 'the remedy of appeal' he approached the civil court and also this Court. The learned advocate submitted that 'subclause (i) of clause 13 of Part II' of the Conditions provides for appeal in cases where the consumer is aggrieved of the decision of the assessing authority. The learned advocate submitted that it is a settled legal position, enumerated by the Honourable the Apex Court in number of decisions that "whenever there is a remedy available under the Statute, the civil courts' jurisdiction stands barred, not by specific provision, then by implication". In support of this submission he

relied on the decision of the Honourable the Apex Court in the matter of Punjab State Electricity Board and another Vs. Ashwani Kumar, reported in (1997) 5 SCC 120. The learned advocate referred to para 8 of the judgement which reads as under:

> "8. The question then arises whether the civil court would be justified in entertaining the suit and issue injunction as prayed for? It is true, as contended by Shri Goyal, learned Senior Counsel, that the objections were raised in the written statement as to the maintainability of the suit but the same were given up. Section 9 of the CPC provides that the civil court shall try all suits of civil nature, subject to pecuniary jurisdiction, unless their cognizance is expressly or by necessary implication barred. Such suit would not be maintainable. It is true that ordinarily, the civil court has jurisdiction to go into and try the disputed questions of civil nature, where the fundamental fairness of procedure has been violated. The statutory circulars adumbrated above do indicate that a fundamental fairness of the procedure has been prescribed in the rules and is being followed. By necessary implication, the cognizance of the civil cause has been excluded. As a consequence, the civil court shall not be justified in entertaining this suit and giving the declaration without directing the party to avail of the remedy provided under the Indian Electricity Act and the Indian Electricity (Supply) Act and the instructions issued by the Board in that behalf from time to time as stated above." (emphasis supplied)

14. He submitted that, besides in the application filed for the interim relief, it is prayed that:

> "Your Honour may give the direction to the defendant that they may reconnect the electric supply of the plaintiff immediately without any delay."

A mandatory relief is prayed for an immediate reconnection.

15. The learned advocate submitted that, the Honourable the Apex Court had occasion to deal with the arguments advanced in such matters for bypassing the

'departmental appeal' and approaching the civil court to the effect that, "the authorities do not hear the parties, nor give a reasoned order" and the same are answered in para 9 of the judgement in the matter of Punjab Electricity Board and another (supra), which reads as under:

> "9. Shri Goyal has contended that the authorities do not hear the parties, nor give a reasoned order. Therefore, the parties cannot be precluded to avail of the remedy of a suit. We cannot accept such a broad and generalised proposition. When the provision for appeal by way of review has been provided by the statutory instructions, and the parties are directed to avail of the remedy, the authorities are enjoined to consider all the objections raised by the consumer and to pass, after consideration, the reasoned order in that behalf, so that the aggrieved consumer, if not satisfied with the order passed by the Board/ appellate authority, can avail of the remedy available under Article 226 of the Constitution. Therefore, by necessary implication, the appropriate competent authority should hear the parties, consider their objections and pass the reasoned order, either accepting or negativing the claim. Of course, it is not like a judgment of a civil court. It is then contended that the respondent has been subjected to pay huge amount of bill in a short period; hence, it is a case for interference. We find no force in the contention. May be that due to the advice given by the counsel, the respondent obviously has availed of the remedy of the suit, instead of departmental appeal. In our view, by necessary implication the suit is not maintainable. Therefore, the respondent is at liberty to avail the remedy of appeal within six weeks from today and raise the factual objections before the Board and the Board/ appellate authority would consider and dispose of them, as indicated earlier, on merits."

16. The learned advocate next relied on a judgement of a Division Bench of this Court in the matter of Kiran Industries, Mehsana Vs. Gujarat Electricity Board, Baroda & another, reported in 1995 (2) GLR 1158, wherein this Honourable Court was pleased to hold that, "when a bill for electricity consumption, incorporation higher charges is served to a consumer, which is subject to review by appellate authority, whose decision is made

finally binding, such determination by the appellate authority can be brought in question before a civil court". That means the consumer will have to go to the forum of departmental appeal and the decision of the appellate authority can be brought before the civil court by filing a civil suit.

17. The learned advocate submitted that, by necessary implication this provision is to be held to be applicable even after specified date in view of the provisions made in section 50 of the new Act. Section 50 of the new Act provides for 'The Electricity Supply Code'. For ready reference it is reproduced herein :

> "The State Commission shall specify an 'Electricity Supply Code' to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non payment thereof, restoration of supply of electricity, tampering, distress or damage to electrical plant, electric lines or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter, entry for replacing, altering or maintaining electric lines or electrical plant or meter." (emphasis supplied)

18. The learned advocate submitted that, until the State Commission specifies an 'Electricity Supply Code', which to his knowledge, the State Commission has not specified so far. By necessary implication, the provisions pertaining to the subject matter which are to be provided for by 'Electricity Supply Code' shall continue to be governed by the provisions under the repealed Act. He submitted that it is a matter, of which a judicial notice can be taken, 'if for the reasons beyond control, the State Commission is not able to specify an 'Electricity Supply Code', persons like the present appellant cannot be allowed to enjoy fruits of their illegal activity of 'malpractice' and/ or 'theft of electric energy'. He submitted that, the submission of the learned advocate appearing for the appellant that, 'until the State Commission specifies 'Electricity Supply Code' the persons like the appellant herein cannot be dealt with for the alleged activities is shocking. He submitted that if the submission made by the learned advocate for the appellant is accepted, it will not only lead to an absurd situation but will also create chaos in the society. In the absence of the 'Electricity Supply Code' the matters pertaining to tampering, distress or

damage to the electric plant, the matters pertaining to disconnection of supply of electricity for non payment of bill cannot be left to the common law.

19. The learned advocate for the opponent submitted that before the learned trial Judge, a written statement was filed, a copy of which is placed on record of this Appeal From Order, wherein it is contended that the suit is not maintainable, that the present case is governed by the provisions of the old Act; that Vigilance officers of the company in their visit to the plaintiff's premises on 02.04.2004 had found that he was dishonestly extracting and consuming energy, amounting to theft of energy and malpractice, the action taken by the company of disconnecting the electricity supply is in accordance with law. It was therefore, prayed that the suit be dismissed with costs, in view of the observations made by this Honourable Court in the matter of Govindbhai Premjibhai Chovata Vs. The Chief General Manager, Gujarat Telecom Circle & others, reported in 1995 (2) GLH 1041 wherein this Court has held that, 'in the matters where an alternative remedy is available even a writ petition before this Court is not maintainable, stay of demand should ordinarily be not granted in the matters of demand raised by such tax authorities providing public facilities'. He submitted that the order of the learned Judge does not warrant interference at the hands of this Court.

20. Mr.Damani, the learned advocate appearing for the appellant tried not only to assail the order but also tried to convince this Court that the provisions of the new Act will govern the case and that until the 'Electricity Supply Code' is specified by the State Commission as provided by section 50 of the new Act, the supply could not have been disconnected by the respondent-company. He also emphasised that the learned Judge has committed an error in not granting relief as prayed for. He also relied upon the following judgements of the Honourable the Apex Court in the matter of (i) Bhanu Construction Co. Pvt. Ltd. Vs. Andhra Bank, Hyderabad and others, reported in A.I.R. 2001 SC 477, (ii) Punjab State Electricity Board Vs. Bassi Cold Storage, Khara and another, reported in A.I.R. 1994 SC 2544, and (iii) Municipal Corporation of Delhi Vs. Messrs Ajanta Iron & Steel Company (Pvt) Ltd., reported in A.I.R. 1990 SC 882.

20.1 In the considered opinion of this Court the above decisions have no application to the facts of the present case. Hence this Appeal From Order is dismissed with

cost of Rs.7500/-, (Rupees seven thousand and five hundred only) which the appellant shall deposit before this Court within four weeks from the date of receipt of this order. Notice is discharged.

21. At this juncture Mr.Damani, the learned advocate for the appellant seeks indulgence of this Court and prays that the appellant may be permitted to withdraw the suit allowing him to have recourse to the remedy available to him under the old Act. Permission is granted. The suit shall stand withdrawn. The respondent, Ahmedabad Electricity Company Ltd. is directed to consider the appeal of the appellant under the provisions of the old Act. The amount of Rs.20,000/-, deposited by the appellant shall be treated towards the required deposit under the old Act, the appellant shall deposit the deficit amount, if any, to entitle him to file the appeal. The Registry is directed to transmit the above amount to the respondent, Ahmedabad Electricity Company Ltd. forthwith.

(Ravi R. Tripathi, J.)
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